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Supreme Court, U.S.
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No. 00-1341

In the

Supreme Court of the United States

KATURIA SMITH, *et al.*,

Petitioners,

v.

UNIVERSITY OF WASHINGTON LAW SCHOOL, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICI CURIAE OF PACIFIC LEGAL FOUNDATION, STEFAN E. CHERESNIK, ALLEN J. HARMAN, AND JOHN L. McGOLDRICK IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Is "academic freedom" or "diversity" a compelling governmental interest sufficient to meet strict scrutiny and to justify race-based preferences in admissions to a state law school under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

2. Does an admissions system that uses such race-based preferences violate Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d) or 42 U.S.C. § 1981?

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INTEREST OF AMICI CURIAE

For more than 25 years, Amicus Pacific Legal Foundation (PLF) has been litigating in support of the rights of individuals to be treated equally by government—without regard to race or sex. PLF has been at the forefront of efforts to defend and enforce the California Civil Rights Initiative, the 1996 measure adopted by the voters to eliminate preferential treatment on the basis of race or sex. PLF has participated as amicus curiae in numerous equal protection cases heard by this Court over the past 25 years, including *Regents of University of California v. Bakke*, 438 U.S. 265 (1978); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).*

Amici Stefan E. Cheresnik, Allen J. Harman, and John L. McGoldrick are plaintiffs in *Cheresnik v. City & County of San Francisco* (N.D. Cal. filed Sept. 7, 1999). The case challenges, as violating the Equal Protection Clause, the City's "Diversity Staffing Plan" for its San Francisco International Airport. This Plan required Airport management to "strive for an employee population reflective of the cultural diversity of San Francisco and the traveling public." To that end, the Airport "targeted" six groups defined by race, ethnicity, or sex. Within each occupational category, "[t]he ethnic and gender composition of the Airport's workforce is . . . compared to the availability percentages of women and [targeted] minorities available in the San Francisco County general labor market." If such comparison revealed that any of the "current utilization percentages of

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* Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, amici curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

women and [targeted] minorities" fell short of the "availability percentages," then one or more of the targeted groups was said to be "underrepresented" in the relevant occupational category. The Plan's aim was to end this so-called underrepresentation and produce a racially and sexually "diverse" workforce.

Messrs. Cheresnik, Harman, and McGoldrick all encountered the discriminatory mandates of the Plan in 1998, when they pursued promotions to the position of Airport Operations Supervisor. They successfully competed to be placed into an "eligible pool" of seven candidates from which promotions would be made as particular positions became available. But after three persons were tapped for promotion, the pool was abruptly terminated. When amici inquired about the reason for the termination, they received the same answer from everyone they asked. As the Airport Operations Superintendent put it, the pool was simply not "racially diverse" enough; that is, it was "too white for City Hall." This answer, for all its bluntness, was not especially surprising, given that the "Diversity Staffing Plan" specifically warned Airport hiring managers and other supervisors that they would be evaluated regarding their "commitment, progress, and success in implementing diversity staffing" in their ranks.

Because the City of San Francisco has not advanced any remedial justification for its race- and sex-conscious employment practices, the constitutionality of those practices will turn largely on whether "diversity" per se constitutes a state interest that is compelling enough to justify racial preferences in public employment. Messrs. Cheresnik, Harman, and McGoldrick file this brief to urge the Court to resolve that question.

SUMMARY OF ARGUMENT

In addition to the deep and self-acknowledged split in the lower courts over whether "diversity" is a compelling interest

that can justify racial classifications, there are two reasons why the Court should grant the petition.

First, the lack of resolution of the questions presented is distorting equal protection jurisprudence even in those courts that (from amici's perspective) reach the "right" result. Thus, although the compelling interest inquiry is, by logic and precedent, supposed to precede the narrow tailoring inquiry, many courts are skipping over the former and proceeding directly to the latter on the "assumption" that "diversity" is a compelling interest. In so doing, courts are deciding cases under hypothetical assumptions, a result not consonant with the rule against advisory opinions. Moreover, repeatedly "assuming without deciding" deprives governments, individuals, and trial judges of needed guidance. Finally, the assumption makes a hash of the principles set down by this Court for assessing whether a racial classification is narrowly tailored.

Second, in the absence of a proximate resolution by this Court of the questions presented, those questions will continue to plague the lower courts. In the short span since the petition was filed, yet another trial court has had to devote significant resources to hear evidence and to wrestle with the vexing legal issues. As illustrated by the case of amici Messrs. Cheresnik, Harman, and McGoldrick, moreover, questions regarding the validity of "diversity" as an interest justifying racial classifications are not confined to the educational context.

ARGUMENT

The petition has capably described how the lower courts are split—badly and self-consciously so—on the two questions presented. As further described in the petition, that split is the result of this Court's not having resolved definitively certain nagging questions about the authority *vel non* of Justice Powell's separate opinion in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978). The following brief will not parrot those descriptions; instead, it will show how the failure to

resolve those questions is warping the lower courts' equal protection jurisprudence. Furthermore, this brief will show that the questions presented are bound to arise again and again until resolved by this Court.

I

THE REIGNING CONFUSION OVER COMPELLING STATE INTERESTS IS WARPING EQUAL PROTECTION JURISPRUDENCE

The analytical framework for resolving an equal protection challenge to a racial classification is well established. As the Court explained in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995), "all governmental action based on race . . . should be subject to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed." In other words, "all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny." *Id.* To apply strict scrutiny to a racial classification is to demand two things: such classification "must serve a compelling governmental interest," and it "must be narrowly tailored to further that interest." *Id.* at 235.

Logic would suggest, and this Court's decisions confirm, that the compelling interest inquiry is analytically prior to the narrowing tailoring inquiry. For example, in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498-506 (1989), this Court first considered whether the city's race-based contracting set-asides served the compelling interest of remedying prior discrimination in the city's construction industry. Only then did the Court go on to ask whether the set-asides were "narrowly tailored to remedy prior discrimination." *Id.* at 507. In this respect, *Croson* "adhere[d] to the standard of review employed in *Wygant*." *Id.* at 494 (plurality opinion) (referring to *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986)). In that earlier decision, the plurality considered first whether a racial

classification was "supported by a compelling state purpose" and only then "whether the means chosen to accomplish that purpose [were] narrowly tailored." 476 U.S. at 274 (plurality opinion); *see also Shaw v. Hunt*, 517 U.S. 899, 908-15 (1996) (first considering whether North Carolina's racial gerrymander of congressional districts served a "compelling state interest"); *id.* at 915-18 (then considering whether that gerrymander was "narrowly tailored" to an assumed compelling interest).

Notwithstanding this framework, the failure to settle the question whether "diversity" is a compelling state interest has led several lower courts to chart a different analytical course. Thus, in a series of decisions that (like this case) involve racial classifications in public school admissions, the First and Fourth Circuits have essentially passed over any consideration of compelling interests and proceeded directly to a consideration of narrow tailoring, on which basis they voided the challenged programs. *See Wessmann v. Gittens*, 160 F.3d 790, 796 (1st Cir. 1998) (asserting that "we need not definitively resolve [the issue] today"); *Tuttle v. Arlington County School Board*, 195 F.3d 698, 705 (4th Cir. 1999) (per curiam) (deciding to "leave the question of whether diversity is a compelling interest unanswered"), *cert. dismissed*, 529 U.S. 1050 (2000); *Eisenberg v. Montgomery County Public Schools*, 197 F.3d 123, 130 (4th Cir. 1999) (observing that "whether diversity is a compelling governmental interest remains unresolved" and opining that "in this case, we also choose to leave it unresolved"), *cert. denied*, 529 U.S. 1019 (2000).

This gaggle of opinions that leave important legal questions unanswered and important legal issues unresolved is an embarrassment. First of all, continually to "assume, without holding . . . that diversity may be a compelling governmental interest," *id.*, is continually to decide cases under hypothetical premises. That kind of decisionmaking is in considerable tension with, if not squarely antithetical to, the idea of a judicial system that scrupulously eschews advisory opinions.

Second, as Justice O'Connor recognized in a similar context—where the Court repeatedly "assumed without deciding that compliance with the results test of [the Voting Rights Act] § 2(b) is a compelling state interest" that justifies racial gerrymandering—such repeated assumptions deprive both litigants and judges of needed guidance. *Bush v. Vera*, 517 U.S. 952, 990 (1996) (O'Connor, J., concurring). If it is true that "States and lower courts are entitled to more definite guidance as they toil with the twin demands of the Fourteenth Amendment and the [Voting Rights Act]," *id.*, then it is likewise true that states and lower courts are entitled to more definite guidance as they toil with the twin demands within the Fourteenth Amendment itself. *Compare Croson*, 488 U.S. at 495 (plurality opinion of O'Connor, J.) (recognizing "the ultimate goal of eliminat[ing] entirely from governmental decisionmaking such irrelevant factors as a human being's race"), *with id.* at 509 (acknowledging that a government may "tak[e] action to rectify the effects of identified [racial] discrimination within its jurisdiction"). As to § 2(b) of the Voting Rights Act, states and lower courts at least could take refuge in the fact that "lower courts have unanimously affirmed its constitutionality." *Bush v. Vera*, 517 U.S. at 991 (O'Connor, J., concurring). By contrast, as to whether "diversity" is a compelling state interest, there is the obvious and self-acknowledged split in the lower courts. Accordingly, only this Court can—and rightfully must—provide the needed "definite guidance" on the issue.

Third, assuming that "diversity" is a compelling interest and then proceeding to consider whether a particular race-based admissions program is narrowly tailored to that interest leads courts to logical absurdities. At the most basic level, "it is almost impossible to assess whether [such program] is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way." *Croson*, 488 U.S. at 507. In this regard, the *almost* qualifier is a charitable sop: it is in fact *logically impossible* to discuss whether a thing is narrowly

tailored to something that simply does not exist. Even so, the lower courts have purported to "assess" narrow tailoring in the complete absence of identified discrimination. *See Wessmann*, 160 F.3d at 796-800 (extensively discussing narrow tailoring in the context of "diversity" without any reference to identified discrimination); *Tuttle*, 195 F.3d at 704-05 (discussing narrow tailoring issue even though "remedy[ing] past discrimination" is a "justification which both sides agree does not apply in the present case"); *Eisenberg*, 197 F.3d at 129 (discussing narrow tailoring even though "the record demonstrates that Montgomery County's transfer policy is not a remedial race-conscious policy").

If one proceeds to take seriously *Croson*'s "two observations" about narrow tailoring, 488 U.S. at 507, the absurdities are compounded. *Croson* first observed, with evident disdain, that there appeared not "to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting." *Id.* But it is impossible to conceive how a court can inquire whether a government has given "any consideration of the use of race-neutral means" of achieving racial "diversity." If to seek "diversity" is to seek "to obtain a student body 'in proportions that approximate the distribution of students from those [racial or ethnic] groups in the district's overall student population,' " *Tuttle*, 195 F.3d at 701 (quoting school district policy), or if the school district has the "goal of keeping certain percentages of racial/ethnic groups within each school to ensure diversity," *Eisenberg*, 197 F.3d at 131, then what could it possibly mean for the district to consider "race-neutral means"? Of course, it doesn't mean anything.

Croson also observed that the city's "30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing." 488 U.S. at 507. The decisions of the courts that have "assumed" that "diversity" is a compelling interest cannot be reconciled with this observation. On the one hand, the observation is unequivocally hostile to the "goal" of

racial balancing. But racial balancing—that is, diversity in the sense of having a proper racial/ethnic balance at each school—is precisely what was being pursued by the school districts in the cases decided by the First and Fourth Circuits. *See Wessman*, 160 F.3d at 799 ("The Policy is, at bottom, a mechanism for racial balancing . . . ."); *Tuttle*, 195 F.3d at 707 ("The means employed by the Policy to achieve such numerical racial and ethnic diversity is racial balancing."); *Eisenberg*, 197 F.3d at 128 ("Montgomery County employs a race-conscious nonremedial transfer policy which amounts to racial balancing."). In light of *Croson*'s dismissal of the notion that racial balancing is a legitimate goal, how could these courts "assume" that the challenged race-based policies satisfied the compelling interest inquiry?

On the other hand, it would appear (in a perverse sort of way) that these courts also erred in concluding that racial balancing fails to satisfy the narrow tailoring inquiry. *Croson* was correct to observe that a quota *is* narrowly tailored to the goal of outright racial balancing. Indeed, admitting and transferring students explicitly on the basis of race seems *perfectly tailored* to a goal of having a student body balanced by race, which is another way of describing a racially "diverse" student body. If that is so, then the First and Fourth Circuits have, in the course of reaching what we believe are correct results, mangled *both* prongs of strict scrutiny.

In sum, the lower courts' reflexive hesitancy to confront head-on whether "diversity" is a compelling state interest—a hesitancy born from a lack of authoritative guidance from this Court—is manifesting itself in numerous distortions of equal protection jurisprudence. Cleaning up these wider distortions, not to mention resolving the particular split ably identified by the petition, is the duty of this Court.

II

THE QUESTIONS PRESENTED WILL CONTINUE TO ARISE UNTIL THIS COURT RESOLVES THEM

As catalogued by the petition, the breadth of cases across the country in which the questions presented have arisen is impressive. Amici think it is important to emphasize that these questions will continue to arise, in the educational context and elsewhere, until resolved by this Court.

As if to underscore this point, yet another constitutional challenge to a public university's "diversity" program was resolved by a federal court just since the petition was filed. Less than a month ago, a district court found, after a 15-day bench trial, that the University of Michigan Law School "explicitly considers the race of applicants in order to enroll a critical mass of underrepresented minority students—that is, the law school wants 10% to 17% of each entering class to consist of African American, Native American, and Hispanic students." *Grutter v. Bollinger*, No. 97-CV-75928-DT, 2001 U.S. Dist. LEXIS 3256, at *61 (E.D. Mich. Mar. 27, 2001). Notwithstanding evidence that such racial "diversity" has "important educational benefits," the district court nevertheless struck down the law school's admission program, concluding that "the achievement of such diversity is not a compelling state interest because it is not a remedy for past discrimination." *Id.* at *81. While this conclusion is in accord with *Johnson v. Board of Regents*, 106 F. Supp. 2d 1362 (S.D. Ga. 2000), it stands in marked contrast to *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000), in which a judge in the very same court *upheld* a similar program in the *same university system*.

If the question of "diversity" continues to arise in numerous educational settings, the case of amici Messrs. Cheresnik, Harman, and McGoldrick is proof that the question is hardly confined to those settings. Public employers like the City of

San Francisco are also relying on "diversity" to justify racial classifications in employment. As noted above in the Interest of Amici Curiae, the "Diversity Staffing Plan" under which the amici suffered adverse employment action required the management of the San Francisco International Airport to "strive for an employee population reflective of the cultural [i.e., racial or ethnic] diversity of San Francisco and the traveling public." This led straight to the racial balancing all too often seen in the educational context: for example, the Plan identified "underrepresentation"—which in turn called for race-based "corrective action"—whenever there were fewer than 0.47% American Indians in a particular "job grouping."

Notwithstanding that San Francisco's "Diversity Staffing Plan" is premised on "the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population," *Croson*, 488 U.S. at 507, the uncertainty as to whether "diversity" is a compelling state interest will force amici to litigate the issue. But is it consistent with judicial economy for yet another court to hear evidence about the so-called "benefits of diversity"? Is it really necessary for yet another court to engage in a lengthy explication of how *Marks v. United States*, 430 U.S. 188, 193 (1977), and other decisions bear on how to read the multiple opinions in *Bakke*? We think not, but it is only this Court that can provide relief. Granting the petition is the quickest way to do so.

CONCLUSION

In *Johnson v. Board of Regents*, District Judge Edenfield accurately observed that lower courts' predilection to "dodge" the issue of compelling state interest "has, in the affirmative action realm, encouraged nothing but endless rounds of costly and divisive litigation." 106 F. Supp. 2d at 1375. Declaring "[t]hat cycle stops here," *id.*, he courageously resolved the issue in the case before him. This Court should do no less.

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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